(3)

No. 04-682

In the Supreme Court of the United States

JIGNESHKUMAR NATVARLA PATEL, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, in a civil immigration proceeding, the failure of privately retained counsel to advise his client that he could apply for a discretionary waiver of deportation violated the Due Process Clause of the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is not published in the Federal Reporter, but is *reprinted in* 104 Fed. Appx. 966, and is *available at* 2004 WL 1598768. The opinions of the Board of Immigration Appeals denying petitioner's motion to reopen (Pet. App. 12-14) and affirming the decision of the immigration judge ordering petitioner's removal (Pet. App. 15-16) are not reported. The decision of the immigration judge (Pet. App. 17-25) is not reported.

JURISDICTION

The court of appeals entered its judgment on July 19, 2004. A petition for rehearing was denied on August 25, 2004 (Pet. App. 26-27). The petition for a writ of

certiorari was filed on November 17, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of India. He was admitted to the United States on February 18, 1997, as a conditional resident based on his arranged marriage to an American citizen the previous year. Pet. App. 2. Eleven months later, petitioner divorced his wife. *Ibid.* Petitioner subsequently filed a petition seeking removal of the condition on his resident status on the ground that he had entered into his marriage in good faith. *Ibid.*; see 8 U.S.C. 1186a(c)(4). The Immigration and Naturalization Service (INS) denied the petition, terminated petitioner's conditional resident status, and initiated removal proceedings. The government charged petitioner with being subject to removal because his conditional residence was terminated, 8 U.S.C. 1227(a)(1)(D)(i), and because he obtained entry through marriage fraud, 8 U.S.C. 1227(a)(1)(G). See Pet. App. 2.[1]

Because petitioner conceded that his admission to the United States as a resident was conditioned on his marriage and that his marriage had been judicially terminated, the immigration judge found petitioner subject to removal. Pet. App. 3. The burden then shifted to petitioner to disprove marriage fraud or to establish that he entered into his marriage in good faith, so that he could obtain a waiver of his conditional status. *Ibid.* The immigration judge held that petitioner failed to

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[1] On March 1, 2003, the functions of the INS were transferred to the Department of Homeland Security and assigned within that Department to Immigration and Customs Enforcement. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 441(2), 116 Stat. 2192 (6 U.S.C. 251(2) (Supp. II 2001)).

produce "any objective evidence of a bona fide marriage," *id.* at 22, given the undisputed evidence of the marriage's brevity, the very short time (three months) that the couple actually lived together, and the absence of any joint financial endeavors or obligations, *id.* at 22-23. The immigration judge accordingly ordered petitioner removed and granted petitioner's request for voluntary departure. *Id.* at 24. Petitioner appealed, arguing that the evidence established a good-faith marriage and that, in any event, the immigration judge failed to require clear and convincing evidence by the INS that the sole purpose of the marriage was to evade the immigration laws. The Board of Immigration Appeals (Board) affirmed without opinion. Pet. App. 15-16.

2. Petitioner sought review of the Board's decision in the United States Court of Appeals for the Fifth Circuit. While that appeal was pending, petitioner filed with the Board a motion to reopen his proceedings on the ground that his attorney's representation was ineffective. Pet. App. 3, 12. The Board denied reopening. The Board found that petitioner failed to establish that additional expert or other testimony was available, non-duplicative, and material to his case. "Based upon th[at] lack of proof," the Board held that counsel did not engage in the type of egregious conduct that could be deemed to have rendered the proceedings unfair. *Id.* at 13-14. Petitioner also sought review of that decision in the court of appeals.

3. The court of appeals denied both petitions for review in a single, unpublished, per curiam decision. Pet. App. 1-11. With respect to the Board's final order of removal, the court held that it lacked jurisdiction to review the denial of discretionary relief. *Id.* at 5. The court explained that petitioner's arguments centered on

the Board's failure to grant a discretionary waiver of removability based on the alleged bona fides of his marriage. Because the immigration law commits the decision to grant such a waiver "solely to the discretion of the Attorney General [now, the Secretary of Homeland Security]," *ibid.*, the court concluded that federal jurisdiction is barred by 8 U.S.C. 1252(a)(2)(B)(ii). That Section proscribes federal court review of "any * * * decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General." 8 U.S.C. 1252(a)(2)(B)(ii).

While the court stated that it retained jurisdiction to review any claim of a substantial constitutional violation, Pet. App. 6, the court concluded that petitioner's argument concerning the allocation of the burden of proof during his proceedings did not rise to that level, *id.* at 8. Indeed, the court explained that the text of the relevant statutory provisions expressly put the burden of proving a good-faith marriage on the alien once the government established that he was admitted on a conditional basis, that the conditional status (the marriage) was terminated, and that the marriage ended within two years of admission. See Pet. App. 6-7 (citing 8 U.S.C. 1186a(c)(4), 1227(a)(1)(G)).

The court also rejected petitioner's argument that the immigration judge denied him substantive due process by failing to inform him that he could apply for a waiver of removability under a different statutory provision, 8 U.S.C. 1227(a)(1)(H), based on the hardship removal would cause to his second wife and children. Pet. App. 8. The court held that it lacked jurisdiction over that claim because petitioner had not raised it before the immigration judge or the Board and thus had

failed to exhaust his administrative remedies, as required by 8 U.S.C. 1252(d)(1).

The court of appeals also affirmed the Board's decision not to reopen petitioner's immigration proceedings. Pet. App. 9-11. The court again concluded that it lacked jurisdiction because the claims of ineffective assistance of counsel pertained to forms of relief that are committed to the sole discretion of the Attorney General (or, now, the Secretary of Homeland Security). *Id.* at 9-10. In addition, the court rejected as "legally untenable," petitioner's argument that counsel's ineffectiveness amounted to a denial of due process because he lacked any protected liberty interest "in obtaining a discretionary waiver of his removability." *Id.* at 10.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. Petitioner's argument (Pet. 5-6) for this Court's review centers on the alleged failure of the immigration judge and his private attorney to advise him that he could apply for discretionary relief from removal under 8 U.S.C. 1227(a)(1)(H) based on his later marriage to another United States citizen. With respect to petitioner's claim that the immigration judge failed to apprise him of this opportunity (see Pet. 6, 12), this Court lacks jurisdiction. As the court of appeals explained (Pet. App. 8), petitioner failed to exhaust that claim. He never presented it to the immigration judge or to the Board of Immigration Appeals; he raised it for the first time in the court of appeals. See *ibid.* Petitioner cites no authority from this Court or any court of ap-

peals that would allow federal court review of that unexhausted claim.

For that same reason, petitioner's argument (Pet. 9, 11) that the court of appeals' decision conflicts with the Ninth Circuit's decision in *United States* v. *Ubaldo-Figueroa*, 364 F.3d 1042 (2004), and the Second Circuit's decision in *United States* v. *Copeland*, 376 F.3d 61 (2004), is without merit. Those cases addressed whether an immigration judge's failure to advise an alien of the availability of certain forms of relief rendered his proceedings fundamentally unfair. See *Copeland*, 376 F.3d at 71; *Ubaldo-Figueroa*, 364 F.3d at 1050. The court of appeals in this case did not address that question at all, due to petitioner's failure to exhaust his administrative remedies. See Pet. App. 8. There thus is nothing for the Second and Ninth Circuits' decisions to conflict with.

2. Petitioner's argument that the court of appeals erred in sustaining the Board's decision not to reopen the case fares no better. That argument rests on the alleged failure of petitioner's privately chosen counsel to inform him that he could apply for discretionary relief under 8 U.S.C. 1227(a)(1)(H) based on his second marriage. The court of appeals correctly ruled that the decision not to reopen proceedings based on error allegedly committed by the alien's own attorney —concerning a possible application for discretionary relief from a valid determination that he was subject to removal—is a decision that is committed to the sole discretion of the Board of Immigration Appeals. Indeed, petitioner identifies no case that has held that alleged omissions in the advice rendered by the *alien's privately retained counsel* concerning possible forms of such discretionary relief constituted a *deprivation* of liberty without due process by the *federal government.*

Cf. *Coleman* v. *Thompson*, 501 U.S. 722, 752-753 (1991) (in habeas corpus proceedings, the petitioner "cannot claim constitutionally ineffective assistance of counsel" he has privately retained; the petitioner "must bear the risk of attorney error" (internal quotation marks omitted)). After all, petitioner was free at all times to pursue the very relief he now belatedly seeks; he had the same opportunity to do so as persons who cannot afford or who choose not to retain counsel; and the government did nothing to prevent, frustrate, or deter the pursuit of such discretionary relief.

In that respect, the court of appeals' decision here accords with the decisions of other courts of appeals. In *Dave* v. *Ashcroft*, 363 F.3d 649 (2004), the Seventh Circuit denied an alien's due process claim based on ineffective assistance of counsel and alleged procedural error by the Board on the ground that aliens have no liberty interest in the discretionary grant of cancellation of removal. *Id.* at 652. Likewise, in *United States* v. *Torres*, 383 F.3d 92 (2004), the Third Circuit rejected the claim that an alien has a constitutionally protected right to be considered for purely discretionary relief from deportation. *Id.* at 105.[2] Indeed, petitioner him-

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[2] See also *United States* v. *Aguirre-Tello*, 353 F.3d 1199, 1204 (10th Cir. 2004) (alien has no constitutional right to be informed of discretionary relief that might be available to him); *Nativi-Gomez* v. *Ashcroft*, 344 F.3d 805, 809 (8th Cir. 2003) (rejecting ineffective assistance of counsel claim because "[t]he failure to receive discretionary adjustment-of-status relief does not constitute the deprivation of a constitutionally-protected liberty interest"); *Garcia* v. *Attorney General*, 329 F.3d 1217, 1223-1224 (11th Cir. 2003) ("attorney's deficient representation does not deprive an alien of due process if the deficient representation merely prevents the alien from being eligible for * * * a discretionary decision"); *Huicochea-Gomez* v. *INS*, 237 F.3d 696, 699-700 (6th Cir. 2001)

self acknowledges (Pet. 9) that "seeming solidarity" in the court of appeals' decisions.[3]

Petitioner's effort (Pet. 9-12) to identify a circuit conflict in that uniform precedent fails. Not one of the cases petitioner cites holds that aliens have a liberty interest protected by the Due Process Clause in having

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(denying ineffective assistance of counsel claim because the alien had no liberty interest in cancellation of removal).

[3] See also *Jupiter* v. *Ashcroft*, 396 F.3d 487, 492 (1st Cir. 2005) (aliens have no liberty interest in discretionary relief of adjustment of status or voluntary departure); *Kwai Fun Wong* v. *United States*, 373 F.3d 952, 968 (9th Cir. 2004) (no Fifth Amendment liberty interest in temporary parole); *Munoz* v. *Ashcroft*, 339 F.3d 950, 954 (9th Cir. 2003) (denial of discretionary relief, which is a privilege created by Congress, cannot violate a substantive interest protected by due process); *United States* v. *Wilson*, 316 F.3d 506, 510 (4th Cir.) (in appeal from an illegal re-entry criminal conviction, court denied alien's due process claim because aliens have no liberty interest in discretionary relief), cert. denied, 538 U.S. 1025 (2003); *Smith* v. *Ashcroft*, 295 F.3d 425, 431 (4th Cir. 2002) (alien has no liberty or property interest in a discretionary waiver of deportability); *Oguejiofor* v. *Attorney General*, 277 F.3d 1305 (11th Cir. 2002) (same); *Escudero-Corona* v. *INS*, 244 F.3d 608 (8th Cir. 2001) (finding no due process or equal protection violation where the underlying relief sought was subject to the Attorney General's unfettered discretion); *Ashki* v. *INS*, 233 F.3d 913, 921 (6th Cir. 2000) (discretionary relief of suspension of deportation is not an interest protected by the Due Process Clause); *Appiah* v. *INS*, 202 F.3d 704, 709 (4th Cir.) (same), cert. denied, 531 U.S. 857 (2000); *Tefel* v. *Reno*, 180 F.3d 1286, 1300 (11th Cir. 1999) (alien has no constitutionally protected interest in relief subject to the Executive Branch's unfettered discretion), cert. denied, 530 U.S. 1228 (2000); *Adras* v. *Nelson*, 917 F.2d 1552, 1558 (11th Cir. 1990) (no liberty interest in discretionary immigration parole); *Achacoso-Sanchez* v. *INS*, 779 F.2d 1260, 1264 (7th Cir. 1985) (no liberty interest in adjustment of status); *Velasco-Gutierrez* v. *Crossland*, 732 F.2d 792, 798 (10th Cir. 1984) (no liberty interest in discretionary deferred action).

their private attorneys advise them that they can apply for a form of discretionary relief. In fact, the Seventh Circuit in *United States* v. *Roque-Espinoza*, 338 F.3d 724 (2003) (cited at Pet. 10), shared the court of appeals' view here that "it would be hard to show that the loss of a chance at wholly discretionary relief from removal is the kind of deprivation of liberty or property that the due process clause is designed to protect." *Id.* at 729. The language in the Seventh Circuit's opinion upon which petitioner relies (Pet. 10) did not pertain to a claim of ineffective assistance of counsel and was, in any event, obiter dicta, introduced by the court's statement that "we have no need to reach Roque-Espinoza's further argument," 338 F.3d at 729, and followed immediately by the conclusion that "[w]e need not decide here how far this line of analysis can be taken * * * because Roque-Espinoza's failure to exhaust the remedies available to him dooms his case no matter what," *id.* at 730.

The Ninth Circuit's decision in *Nakamoto* v. *Ashcroft*, 363 F.3d 874 (2004) (cited at Pet. 12), is inapt. That case held only that, under 8 U.S.C. 1227(a)(1)(G), the factual and legal determination of whether an alien committed marriage fraud is not committed exclusively to the discretion of the Attorney General (or the Secretary of Homeland Security). That case did not concern the purely discretionary decision to reopen a case based on private counsel's errors in connection with a possible application for discretionary relief from removal or to grant relief from removal and adjustment of status based on a subsequent marriage to a different United States citizen, under 8 U.S.C. 1227(a)(1)(H). See also Pet. App. 5 n.3 (distinguishing *Nakamoto* and noting that the court's decision in this case involved the additional and distinct question of obtaining a discre-

tionary waiver of the condition on admission based on a good faith marriage, which was not at issue in *Nakamoto*).[4]

3. Petitioner further errs (Pet. 6-8) in arguing that the court of appeals' decision conflicts with this Court's decision in *INS* v. *St. Cyr*, 533 U.S. 289 (2001). *St. Cyr* involved the distinct question of whether aliens can obtain review of a pure question of law in habeas corpus proceedings. The Court held that applying the statutory provisions barring direct judicial review to bar habeas review of such a question would raise a substantial constitutional question under the Suspension Clause, U.S. Const. Art. I, § 9, Cl. 2. See *St. Cyr*, 533 U.S. at 300. Accordingly, in the absence of an express statutory provision proscribing review of claims in habeas corpus, this Court declined to apply the statutory limitations on direct judicial review to that habeas corpus proceeding. *Id.* at 314. *St. Cyr* did not involve any question of ineffective counsel or the application of the Due Process Clause to requests for purely discretionary relief. And the court of appeals' decision in this case did not address the availability of relief in habeas corpus, nor did it address what claims an alien could raise in a petition for a writ of habeas corpus. Accordingly, *St. Cyr* furnishes no reason for granting review in this case.

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[4] The Eighth Circuit's decision in *Patel* v. *Ashcroft*, 375 F.3d 693 (2004) (cited at Pet. 10), does not conflict with the Fifth Circuit's jurisdictional holding in this case because the Eighth Circuit did not address that jurisdictional issue in its opinion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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